

LETTER OPINION
98-L-1

January 8, 1998

Mr. Wayne P. Jones
Ransom County State's Attorney
PO Box 391
Lisbon, ND 58054-0391

Dear Mr. Jones:

Thank you for your letter asking when posted land may be entered to recover game shot or killed under N.D.C.C. § 20.1-01-19. Specifically, you ask the following questions:

1. Whether posted land means posted as set out in N.D.C.C. § 20.1-01-17?
2. If posted land means land posted "No Hunting", does this mean that land posted "No Trespassing" or "No Hunting and No Trespassing" is land which cannot be entered, and if entered would constitute a criminal trespass under N.D.C.C. § 12.1-22-03?

N.D.C.C. § 20.1-01-19 provides:

Any person may enter upon legally posted land to recover game shot or killed on land where he had a lawful right to hunt.

N.D.C.C. § 20.1-01-17 provides:

Only the owner or tenant of any land may post it by placing signs alongside the public highway or the land giving notice that no hunting is permitted on the land. The name of the person posting the land must appear on each sign in legible characters. The signs must be readable from the outside of the land and must be placed conspicuously not more than eight hundred eighty yards [804.68 meters] apart. As to land entirely enclosed by a fence or other enclosure, posting of signs at or on all gates through the fence or enclosure constitutes a posting of all the enclosed land. No person may in any manner deface, take down, or destroy posting signs.

N.D.C.C. § 12.1-22-03(3) provides:

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A person is guilty of a class B misdemeanor if, knowing that that person is not licensed or privileged to do so, that person enters or remains in any place as to which notice against trespass is given by actual communication to the actor by the person in charge of the premises or other authorized person or by posting in a manner reasonably likely to come to the attention of intruders. The name of the person posting the premises must appear on each sign in legible characters. A person who violates this subsection is guilty of a class A misdemeanor for the second or subsequent offense within a two-year period.

To prove trespass under N.D.C.C. § 12.1-22-03, the trespasser must have known that he or she was not licensed or privileged to be in or on the property in question. The trespasser must either be told verbally or by the posting of a sign that entry or continued presence on the property is not permitted. See Letter from Attorney General Nicholas J. Spaeth to Representative Dick Tokach (January 24, 1990). It is possible for a prosecutor to initiate a criminal case against a trespasser on agricultural land under the provisions of N.D.C.C. § 12.1-22-03. If a trespasser has been told by verbal or posted warning that such trespasser is not to be on the property, remaining on that property may subject that person to criminal liability. Id.

In response to your first question and based on a plain reading of the statutes, it is my opinion that the use of the language "legally posted land" in N.D.C.C. § 20.1-01-19 includes land posted "no hunting" under N.D.C.C. § 20.1-01-17. A person may retrieve game from land posted for "no hunting" without violating N.D.C.C. § 20.1-01-18¹ for hunting on posted land.

Your second question presents a more difficult issue. Another way of asking the question is whether N.D.C.C. § 20.1-01-19 creates a license or privilege to enter land posted "no trespassing" under N.D.C.C. § 12.1-22-03(3) to recover game shot or killed on land where the hunter had a lawful right to hunt.

It is a well-settled principle of statutory construction that penal statutes should be strictly construed against the government and in favor of the accused. State v. Drader, 432 N.W.2d 553 (N.D. 1988);

¹ N.D.C.C. § 20.1-01-18 provides, in part, that "[n]o person may hunt or pursue game, or enter for those purposes, upon legally posted land belonging to another without first obtaining the permission of the person legally entitled to grant the same."

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State v. Corbin, infra; State v. Hogie, 424 N.W.2d 630 (N.D. 1988); State v. Sheldon, 312 N.W.2d 367 (N.D. 1981). See also 3 Singer, Sutherland Statutory Construction § 59.03 (5th ed. 1992). In interpreting criminal statutes, any doubt or ambiguity in the interpretation of the penal statute is resolved in favor of the accused. State v. Brossart, 565 N.W.2d 752, 758 (N.D. 1997); State v. Rohrich, 450 N.W.2d 774, 776-77 (N.D. 1990); Hogie, 424 N.W.2d at 635. N.D.C.C. § 12.1-22-03(3) and N.D.C.C. § 20.1-01-18 are both criminal statutes. Thus, any ambiguities in those statutes will be interpreted in favor of the accused.

N.D.C.C. § 20.1-01-19 gives a license or privilege to enter upon **legally posted land** to recover game shot or killed on land where the hunter had a lawful right to hunt. It does not by its express terms limit its application to land legally posted as required by N.D.C.C. § 20.1-01-17. N.D.C.C. § 12.1-22-03(3) refers to "posting in a manner reasonably likely to come to the attention of intruders" as one of the ways by which notice against trespass is given by actual communication to the trespasser. Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. To "post" means to "bring to the notice or attention of the public by affixing to a post or wall, or putting up in some public place." Black's Law Dictionary 1166 (6th ed. 1991). Applying the rules of construction that apply to penal statutes, any ambiguity in the meaning of "posted" or "posting" under N.D.C.C. § 20.1-01-19 and N.D.C.C. § 12.1-22-03(3) will be interpreted in favor of the accused. Thus, the phrase "legally posted land" in N.D.C.C. § 20.1-01-19 refers not only to land legally posted under N.D.C.C. § 20.1-01-17, but also land legally posted pursuant to N.D.C.C. § 12.1-22-03(3). It is my opinion that N.D.C.C. § 20.1-01-19 allows a hunter to enter upon legally posted land, including land posted for "no trespassing" under N.D.C.C. § 12.1-22-03(3), to recover game shot or killed on land where the hunter had a lawful right to hunt.² Cf. State v. Corbin, 343 N.W.2d

² Letter from Attorney General Nicholas J. Spaeth to Representative Dick Tokach (January 24, 1990) explains that prosecutors generally favor prosecutions under N.D.C.C. § 20.1-01-18 to N.D.C.C. § 12.1-22-03(3) because the posting requirements are clear and well defined under N.D.C.C. § 20.1-01-18, whereas N.D.C.C. § 12.1-22-03(3) requires only that property be posted "in a manner reasonably likely to come to the attention of intruders." Enforcement problems would be created by allowing hunters to recover game from land posted "no hunting" under N.D.C.C. § 20.1-01-17, in which the posting requirements are clear and strict, but not on "no trespassing" land

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874 (Minn.App. 1984) (statute authorizing hunters to retrieve wounded game animals on unposted agricultural land, which otherwise under state law was not open to hunting without landowner permission, provided defense to charge of criminal trespass against hunters who retrieved a wounded deer from an unharvested grain field despite being orally notified by landowner not to retrieve deer until field was harvested; penal statutes would be strictly construed in favor of accused).

This right to enter upon legally posted land to recover game shot or killed on land where the hunter had a lawful right to hunt is not absolute, however. N.D.C.C. § 20.1-01-20 creates a presumption that anyone who enters with a firearm upon legally posted land of another without permission of the owner enters to hunt or pursue game. Thus, a hunter who retrieves game on posted land

should not take his gun with him, for entry upon posted land with a gun is forbidden by section 20-0120.³

Letter of Attorney General Elmo T. Christianson to Game and Fish (October 25, 1950).

Thus, a hunter may enter land posted "no hunting" or "no trespassing" or "no hunting or trespassing" to recover game shot on land where the hunter had a lawful right to hunt. However, before a hunter may enter on posted land with a firearm, the hunter must have the tenant or landowner's permission.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

posted under N.D.C.C. § 12.1-22-03(3), where the posting requirements are vague and less strict.

³ Section 20-0120 was reenacted in 1973 as N.D.C.C. § 20.1-01-20.